amend the complaint. App. at 3a. Unlike the district court, the Third Circuit ruled that the proposed amendment stated a viable claim that was not barred by the statute of limitations since it would have related back to the original filing date under Rule 15(c). App. at 9a – 12a. Nonetheless, the Third Circuit held that the district court did not abuse its discretion in denying leave to amend to add the other 34 "successorship" assignments because USS had unduly delayed seeking leave to amend. The Third Circuit reasoned that (1) someone at USS must have received notice of the 34 "successorship" assignments in 1995, even if USS' counsel were not aware of them when they filed the original and amended complaints, and (2) based on that constructive notice and USS' two earlier opportunities to amend the complaint (albeit to add unrelated counts), USS unduly delayed moving for leave to amend. App. at 12a – 15a.

Notably, the Third Circuit did not find that the delay prejudiced SSA or would have procedurally burdened the district court in any respect. Nor did the Third Circuit find any bad faith or dilatory motive on the part of USS. Therefore, the Third Circuit effectively ruled that delay, without bad faith, prejudice, or burden on the court, can justify a denial of leave to amend. In so ruling, the Third Circuit disregarded its own precedent holding to the contrary.[3]

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[3] For example, in *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 939 (3d Cir. 1984), the Third Circuit stated that "the delay exception in amending the complaint refers to delay in the actual proceeding in which the complaint occurs, not delay in bringing the suit. Thus, *Foman* couples the delay consideration with prejudice to the opposing party." *See also Cornell & Co., Inc. v. Occupational Safety and Health Commission*, 573 F.2d 820, 823 (3d Cir. 1978) ("Delay alone, however, is an insufficient ground to

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to resolve a split among the circuit courts regarding whether delay, unaccompanied by bad faith, prejudice to the opposing party, or an unwarranted burden on the court, can justify a denial of leave to amend under Rule 15(a). As set forth below, a majority of the circuit courts hold that bad faith, prejudice, or a burden on the court must accompany the delay to deny leave to amend. This Court should adopt the majority view as a uniform approach given the liberal letter and spirit of Rule 15(a) and the arbitrary and unjust results the minority view produces. Indeed, as described below, this case presents an excellent example of why the minority rule is arbitrary and unjust.

A. Rule 15(a) and the *Foman* decision.

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires." Citing that language, this Court ruled in *Foman v. Davis*, 371 U.S. 178 (1962) as follows:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,

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deny an amendment, unless the delay unduly prejudices the non-moving party. It is well settled that prejudice to the non-moving party is the touchstone for the denial of an amendment.")

> undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

371 U.S. at 182.

B. The split among the circuits.

The circuits disagree on whether, under Rule 15(a) and *Foman,* a showing of bad faith, prejudice to the non-moving party, or a burden on the court must accompany the delay in order to deny leave to amend.

1. A majority of the circuits interpret Rule 15(a) and *Foman* to require that delay be accompanied by prejudice to the opposing party, bad faith, or a burden on the district court to deny leave to amend.

A majority of the circuits hold that delay, regardless of its length, is not sufficient to deny leave to amend a pleading. Instead, to deny leave to amend, these circuits require evidence of bad faith, prejudice to the non-moving party, or a burden on the court. The following summary highlights the majority's position on this issue.[4]

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[4] Wright & Miller recognize the majority view: "Perhaps the most important factor listed by the Court [in *Foman*] and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading. [Footnote omitted.] Conversely, if the court is persuaded that no prejudice will accrue, the amendment should be allowed." [Footnote omitted.] Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 6 *Federal Practice and Procedure*, §1487 (1990).

- **Second Circuit**: *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 855-856 (2d Cir. 1981) ("Reasons for a proper denial of leave to amend include undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party [citing *Foman*]. Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend.")

- **Fourth Circuit**: *The Pittston Company v. United States,* 199 F.3d 694, 706 (4th Cir. 1999), *cert. denied,* 175 S. Ct. 1589 (2005) ("It is well established in this circuit that '[d]elay alone, without prejudice, does not support the denial of a motion for leave to amend.'")

- **Sixth Circuit:** *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) ("To deny a motion to amend, a court must find 'at least some significant showing of prejudice to the opponent' .... [D]elay alone, regardless of its length is not enough to bar it [amendment] if the other party is not prejudiced.")

- **Seventh Circuit:** *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792-793 (7th Cir. 2004) ("[D]elay by itself is normally an insufficient reason to deny a motion for leave to amend. [Citation omitted.] Delay must be coupled with some other reason. Typically, that reason, as the court determined it was in this case, is prejudice to the non-moving party.")

- **Eighth Circuit:** *Roberson v. Hayti Police Dep't.*, 241 F.3d 992, 995-6 (8th Cir. 2001) ("Delay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing the amendment.")

- **Ninth Circuit:** *Bowles v. Reade*, 198 F.3d 752, 757-758 (9th Cir. 1999) ("Undue delay by itself, however, is insufficient to justify denying a motion to amend. We have previously reversed the denial of a motion for leave to amend where the district court did not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party or futility of the amendment.")

- **Eleventh Circuit:** *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001) ("The lengthy nature of the litigation, without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend their complaint.")

2. A minority of the circuits interpret Rule 15(a) and *Foman* to require only delay to deny leave to amend.

A minority of the circuits interpret Rule 15(a) and *Foman* to permit a denial of leave to amend on the basis of delay without a showing of bad faith, prejudice, or burden on the court. The minority's position on this issue is highlighted by the following summary.

- **First Circuit**: *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 52 (1st Cir. 1998) ("[W]hen considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay.")

- **Fifth Circuit**: *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) ("Although Rule 15(a) does not impose a time limit for 'permissive amendment, at some point, time delay on the part of a plaintiff can be procedurally fatal.' [Citation omitted.] In such a situation, the plaintiff bears the burden of showing the delay to be 'due to oversight, inadvertence, or excusable neglect.'")

- **Tenth Circuit**: *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365-1366 (10th Cir. 1993) ("It is well settled in this Circuit that untimeliness alone is an adequate reason to refuse leave to amend.")

C. This case presents an important issue of federal law.

This case presents an important issue of federal law that the Court should decide for two reasons. First and foremost, the disagreement among the circuit courts on the proper application of Rule 15(a) subjects parties seeking leave to amend to materially different standards. Second, the application of the minority view, as adopted by the Third Circuit in this case, undermines the letter and spirit of Rule 15(a).

Rule 15(a) was intended to encourage the determination of claims on the merits unless countervailing circumstances

override that objective. Bad faith, prejudice to an opposing party, and an unwarranted procedural burden on the court have been recognized as factors that can outweigh the goal of having claims decided on their merits.

In contrast, denying leave to amend based on delay without one of the foregoing factors undermines the goal of having claims decided on their merits. Even when there has been a long delay in seeking leave to amend, denying a party the opportunity to have its claim heard on the merits where the opponent is not prejudiced and the court is not burdened with resulting procedural delay deprives the moving party of justice and creates a windfall for the opposing party. In essence, the denial of a motion for leave to amend based on benign delay amounts to punishment disproportionate to the "offense."

Moreover, the minority's focus on the length of the delay and the nature of a party's excuse for the delay, but without any consideration of its impact on the opposing party or the court, necessarily invites arbitrary applications of Rule 15(a). How long is too long? What standards apply to determine if the delay should be excused? Should the validity of an excuse be made on the record without a hearing?

This case is a good example of how the minority view produces an arbitrary and unjust result. Here, the lower court's decision foreclosed USS from being relieved of patently invalid "successorship" assignments. (USS estimates it will have to spend over $1,000,000 paying for the patently erroneous 34 other "successorship" assignments.) Moreover, the lower court's denial of USS' motion to amend did not advance the case in the least since it took the magistrate judge six more months to grant summary judgment on the newly revived "successorship" counts, and 12 more months to

resolve the remaining counts. Finally, by faulting of USS for not recognizing that it had received 34 additional "successorship" assignments (out of over 5000 assignments) when it filed the original complaint, and then faulting USS again for not having included the same "successorship" assignments (that its counsel still did not know about) with two unrelated amendments to the complaint, the lower court penalized USS twice for the failure to discover these "successorship" assignments earlier. In short, this case aptly illustrates how the minority view on amendments unjustly penalizes parties for benign delay.

D. Conclusion.

The split among the circuits regarding the proper interpretation of Rule 15(a) presents an issue of national importance regarding the fair and effective administration of the Federal Rules of Civil Procedure. The Court should hear this case to resolve this split and to remedy the grave injustice resulting from the lower court's denial of USS' motion for leave to amend.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1247

[Filed March 31, 2005]

USX CORPORATION and U.S. STEEL MINING COMPANY, INC., Appellants	)
v.	)
JO ANNE B. BARNHART, Commissioner of Social Security	)

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER and VAN ANTWERPEN, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by panel and the Court en banc, is denied.

BY THE COURT,

/s/ _____
Anthony J. Scirica
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1247

[Filed December 23, 2004]

USX CORPORATION and	)
U.S. STEEL MINING COMPANY, INC.,	)
Appellants	)
	)
v.	)
	)
JO ANNE B. BARNHART,	)
Commissioner of Social Security	)
	)

On Appeal from the
United States District Court
for the Western District of Pennsylvania
(Dist. Ct. No. 99-1058)
District Judges: Hon. Donald E. Ziegler,
Hon. Robert J. Cindrich

Before: SCIRICA, Chief Judge, and McKEE and CHERTOFF, Circuit Judges.

OPINION OF THE COURT

CHERTOFF, *Circuit Judge*.

Appellants USX Corporation (USX) and U.S. Steel Mining Company, Inc. (USSM),[1] plaintiffs below, challenge several decisions by the District Court granting summary judgment for the Commissioner on the majority of appellants' claims. We will affirm.

I

In 1970, USX purchased the assets of the Grapevine No. 8 Mine, the last significant coal mine owned by Crystal Block, which ceased to operate coal mines after that sale. In 1981, USX in turn sold those same assets to Old Ben Coal Company, which was still operating when appellants filed their complaint. Pursuant to the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (the "Coal Act"),[2] on September 28 and October 7 and 8, 1993, the Social Security Administration (SSA) assigned USX health benefit premium responsibility for sixty-seven retired miners (and their dependents) who had been employed by Crystal Block. In the letters notifying appellants of the assignments, SSA informed them that they had the right to request the miners' earning records and bases for the assignments within thirty days, and then to seek administrative review within thirty days of receipt of that information.

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[1] USSM is a subsidiary of USX.

[2] The purpose and history of the Coal Act are set forth in detail in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 504-15, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), and Unity Real Estate Co. v. Hudson, 178 F.3d 649, 653-54 (3d Cir. 1999).

On June 30, 1995, the Commissioner assigned additional miners employed by Crystal Block to USX on the ground that USX was related to the signatory operator. By letter dated August 1, 1995, USX requested the earnings records of those miners, as well as the bases for the assignments. On September 5, 1995, SSA denied USX's request for information on the ground that the request was untimely. Despite denying this request, SSA nevertheless provided USX with the Crystal Block miners' earnings records. On May 14, 1996, USX requested additional information and a ninety-day extension of time to appeal the assignments.

By letter dated June 10, 1996, SSA supplied USX with the names of the originally assigned coal operators. In a separate letter on that same day, however, it informed USX that it had erroneously provided the information regarding the beneficiaries assigned on June 30, 1995 and that it could not review those assignments because USX's request had been untimely. On August 12, 1996, USX requested that SSA revoke the Crystal Block beneficiary assignments because they were improper. SSA denied review of the June 30, 1995 assignments on September 4, 1997, informing USX on September 23, 1997 that its decision was final.

Appellants commenced this action on July 2, 1999, alleging that the Commissioner had improperly assigned to appellants the health benefit premium responsibilities for a significant number of coal miners. Appellants also claimed that the Commissioner had refused to provide the earnings records upon request, as required by the Coal Act, and that the Commissioner had improperly refused to review many of the allegedly erroneous assignments. Appellants' Second Amended Complaint contained thirteen counts, which the District Court disposed of on summary judgment in a series of opinions and orders. The District Court entered a final

judgment on November 5, 2003. The court then denied appellants' motion to amend the judgment on January 6, 2004 and appellants timely appealed.

II

Our review of a District Court's grant of summary judgment is plenary. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir. 2003). We assess the record using the same summary judgment standard that guides district courts. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000). To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A

The Coal Act directs the Commissioner to assign health benefit premium responsibilities to a "related person" where the beneficiary's pertinent signatory operator is no longer in business. 26 U.S.C. §§ 9701(c)(2), 9706(a). The Commissioner initially construed this provision as authorizing assignments to the direct successor-in-interest of the employing, signatory operator when the signatory operator was no longer in business. Appellants claimed below that the Commissioner lacked statutory authority to make assignments under this successorship theory.

The District Court initially rejected this contention and granted partial summary judgment to the Commissioner. Appellants moved for reconsideration and, while that motion was pending, the Supreme Court held in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 151 L. Ed. 2d 908

(2002), that the Commissioner lacked statutory authority to assign miners to the direct successor of a signatory operator. Appellants in this case then argued that *Sigmon Coal* compelled the court to grant their pending motion for reconsideration and grant them judgment on their challenges to the successorship theory in Counts I and II of their Second Amended Complaint. Appellants also argued that they should be permitted to amend their complaint for the third time so as to challenge additional miner assignments that, though not identified in any of the prior complaints, were also allegedly based on the successorship theory rejected by *Sigmon Coal*.

The District Court reversed its holding and granted summary judgment for appellants with respect to the successorship-based miner assignments identified in the Second Amended Complaint. However, it denied appellants leave to file a third amended complaint insofar as the amendment would add a challenge to successorship-based miner assignments appellants had not previously identified.

I

Appellants first argue that the District Court violated Federal Rule of Civil Procedure 54(c) when it refused to order the Commissioner to rescind all of the assignments she had made under the successorship theory invalidated in Sigmon Coal, including those assignments not identified in Counts I and II of the Second Amended Complaint. The argument is meritless.

Rule 54(c) provides, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c). This rule "requires that a court ascertain whether the

plaintiffs are entitled to any remedy. As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not." *Kirby v. United States Gov't*, 745 F.2d 204, 207 (3d Cir. 1984) (emphasis omitted).

Appellants misconstrue the benefit afforded plaintiffs by Rule 54(c). The rule was meant to protect a plaintiff from clumsy pleading, which, through technical oversight, might deprive it of a deserved recovery. "The [rule's] most common usage is when the amount of the award varies from the demand for relief." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2664, at 183 (3d ed. 1998). The rule has also been used to allow for the award of attorney's fees and costs even though none was demanded, or for recovering interest on a claim as damages. *Id.* at 185-86. As the Advisory Committee explains, it "makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both." Fed. R. Civ. P. 54 advisory committee's note to 1937 adoption. In other words, Rule 54(c) addresses and cures a limited formal problem. It is not designed to allow plaintiffs to recover for claims they never alleged.

Here, by contrast, appellants are not seeking to vary relief but to add judgments based on new claims of additional improper beneficiary assignments. By trying to invoke Rule 54(c), appellants confuse the demand for relief with the claims on which that demand is based. While "[i]nasmuch as the demand for relief does not constitute part of the pleader's claim for relief, a failure to demand the appropriate relief will not result in a dismissal," the converse is not true. Wright et al., *supra*, § 2664, at 180. That is, "the court cannot provide a remedy, even if one is demanded, when plaintiff has failed

to set out a claim for relief." *Id.* at 179; see also 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.72(2), at 54-137 (3d ed. 2004) ("The Rule permits relief not demanded only when the party affirmatively shows an entitlement to the relief and is inapplicable when the pleader fails to demonstrate the proper substantive grounds for relief."). That is precisely what appellants seek here.

Moreover, simply entering judgment against the Commissioner on numerous additional assignments of unidentified miners would prejudice the SSA. There may be other issues that need to be litigated to determine whether an assignment was improper. Had the District Court simply granted judgment for appellants on the unspecified assignments, the Commissioner would be foreclosed from litigating those issues. Under any reading of Rule 54(c), it cannot be deployed to pretermit the Commissioner from raising additional defenses to hitherto unlitigated claims. Wright et al., *supra*, § 2664, at 173-79 (noting that relief should not be amended under Rule 54(c) if failure to include in the demand has prejudiced adversary). For these reasons, the District Court did not err.

2

As an alternative, appellants also moved in the District Court to file a third amended complaint listing the additional miners that had allegedly been improperly assigned in light of *Sigmon Coal*. The District Court denied leave on two grounds: (1) that amendment would be futile as the new claims were barred by the statute of limitations, and (2) unreasonable delay. We will uphold the District Court's decision on the ground of unreasonable delay.

Federal Rule of Civil Procedure 15(a) provides, in pertinent part, that after a responsive pleading, a party may amend its pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In the absence of substantial or undue prejudice to the nonmoving party—which "is the touchstone for the denial of an amendment"—"denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993) (quotation marks omitted) (*citing Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

Turning first to futility of amendment, a six-year statute of limitations applies to civil actions brought against the United States for review of decisions by administrative agencies. 28 U.S.C. § 2401(a). Appellants concede that the proposed amendment would be outside this limitations period. However, they argue that the amendment would not be futile because it would relate back to the date of the original complaint, which was within the limitations period.

Federal Rule of Civil Procedure 15(c)(2) provides, in relevant part, "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ."

> [A]mendments that restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading fall within Rule 15(c). In essence, application of Rule

> 15(c) involves a search for a common core of operative facts in the two pleadings. As such, the court looks to whether the opposing party has had fair notice of the general fact situation and legal theory upon which the amending party proceeds.

Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 310 (3d Cir. 2004) (citations omitted).

Appellants argue that the language of the original complaint—specifically, that "[t]he Commissioner cannot, as a matter of law, assign miners to successors under Section 9706(a) of the Coal Act" (App. 162; *see also* App. 165 (same))—is broad enough for Rule 15(c) purposes to capture the listing of additional miners. Appellants cite *FDIC v. Conner*, 20 F.3d 1376 (5th Cir. 1994). There, the FDIC filed suit against the directors of a failed bank, alleging that they had acted negligently in approving twenty-one specified loans to specified borrowers. *Id.* at 1378. The FDIC later sought leave to amend its complaint to add several more loans that had not been identified in the original complaint. *Id.* at 1385. The Fifth Circuit held that the amendment related back to the date of the original complaint because it simply identified "additional sources of damages that were caused by the same pattern of conduct identified in the original complaint." *Id.* at 1386.

The Commissioner responds that appellants fail to account for factual and procedural issues that may bear on the validity of each individual assignment, such as whether the successorship theory was actually the basis for the assignment, whether appellants exhausted administrative remedies, and whether a miner's work history affords a basis for sustaining the assignment on other grounds. These arguments—while meritorious in rebuffing appellants' effort

to invoke Rule 54(c)—are misplaced in the context of a request to amend a pleading. The Commissioner is not foreclosed from defending the assignments once the complaint is amended.

While the assignment of each miner was itself a separate transaction or occurrence, the conduct of the Commissioner in relying on the (now-invalidated) successorship doctrine was common to all of the assignments. In this way, the Commissioner had notice of the problem in its assignments and had notice that any assignments based on that theory were in jeopardy. Furthermore, the Commissioner could still argue that some or all of the added assignments were not based on the successorship doctrine and that those specific assignments should not relate back. She would also have various substantive and procedural arguments at her disposal to defend the assignments that do relate back. Allowing relation back under Rule 15(c) also comports with "the general presumption in favor of allowing a party to amend pleadings." *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984) (per curiam) (citing *Foman*, 371 U.S. at 182).

That being said, however, we conclude that the District Court did not abuse its discretion in denying leave to amend based on appellants' "undue delay." *Foman*, 371 U.S. at 182. We have held that "the mere passage of time does not require that a motion to amend a complaint be denied on grounds of delay"; "delay alone is an insufficient ground to deny leave to amend." *Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001). At some point, however, "delay will become 'undue,' placing an unwarranted burden on the court, or will become 'prejudicial,' placing an unfair burden on the opposing party." *Id.* (quotation marks omitted). Significantly, "[d]elay may become undue when a movant has had previous

opportunities to amend a complaint." *Id.* Interests in judicial economy and finality of litigation become "particularly compelling" when "a party delays making a motion to amend until after summary judgment has been granted to the adverse party." *Id.* We must therefore "focus on the movant's reasons for not amending sooner" in analyzing the question of undue delay. *Id.*

Appellants originally explained their delay in seeking an amendment (or challenging the additional assignments at all) on the ground that they did not have notice of these assignments when they filed their original complaint. In support of that explanation, they submitted the affidavit of a vice president of USSM stating that when he assumed responsibility for the Coal Act assignments in December 1995, he did not have personal knowledge of the assignments now sought to be included because the letters were not in the files he received when he took charge. He first learned of these assignments when he reviewed the administrative record sometime after May 15, 2001.

As that administrative record reflects, SSA sent assignment letters to appellants on September 28, 1993 and June 30, 1995. The District Court correctly concluded that, based on these letters to appellant corporations, the vice president's personal knowledge was irrelevant. Appellants had notice and in fact belatedly challenged the June 30, 1995 assignments on August 21, 1995. Appellants' plea that one official—out of a large organization—did not have personal notice is therefore no justification.

Appellants offer no other excuse for failing to include these assignments in their original complaint. Rather, the thrust of their argument is as follows: The District Court originally denied their successorship argument. Until the

Supreme Court decided *Sigmon Coal*, they had no reason to believe that amending their complaint to include the additional assignments would have been worthwhile. Therefore, that delay, and the failure to list the additional assignments in their first and second amendments, should not be held against them. *Cf. Boileau*, 730 F.2d at 938 (not charging plaintiff with delay where district court proceedings had been stayed).

Even accepting the legal premise, appellants' argument is belied by the facts. The Magistrate Judge issued her report recommending summary judgment for the Commissioner on Counts I and II—on the later-rejected successorship ground—on August 30, 2000. The District Court adopted that report on September 29, 2000. Appellants first amended complaint, however, was filed on November 3, 1999.[3] Therefore, at the time of their first amendment—and for almost a year thereafter—appellants had no reason to believe that listing the additional assignments would be futile.

Finally, appellants assert that "between September 29, 2000 and February 2002, [they] did not have any reason to believe that the Court would permit [them] to amend the dismissed Counts to expand [their] claim for relief." (Appellants Br. at 27.) This excuse is strikingly similar to that rejected in *Cureton*, where "the only real reason advanced by plaintiffs for the substantial lapse in time was plaintiffs' misplaced confidence in their original disparate impact theory." 252 F.3d at 274.

In *Cureton*, denial of leave was not an abuse of discretion where the motion was filed three years after the complaint

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[3] Appellants' second amended complaint was filed on April 16, 2001.

was filed, the facts underlying the amendment were known almost two-and-one-half years before plaintiffs sought leave to amend, judicial efficiency would be damaged, and the interest in finality would be compromised. *Id.* Similarly, in *Lorenz*, despite no finding of prejudice to defendants, leave to amend was properly denied where it was requested three years after the action was filed and nearly two years after the complaint was amended for the second time, all of the facts were available to plaintiff before she amended her complaint (and most were known before she filed her original complaint), and she had numerous opportunities to correct any deficiencies. 1 F.3d at 1414. The facts in this case fit comfortably within *Cureton* and *Lorenz*. Appellants waited over three years to amend to contest these assignments and had notice of the assignments prior to filing both the original complaint and the first amended complaint. It was not an abuse of discretion for the District Court to deny leave to amend.

B

The District Court granted summary judgment for the Commissioner on appellants' claim that the Commissioner improperly refused to review the June 30, 1995 assignments on timeliness grounds. Conceding that they requested the miners' earning records "a few days late" (Appellants Br. at 28), appellants argue that SSA nonetheless provided those records and appellants, in turn, requested review within thirty days of receiving those records. Appellants conclude that their request was therefore timely. Alternatively, appellants contend that the Commissioner violated a number of regulations and internal operating procedures, rendering her refusal arbitrary and capricious. These arguments are meritless.

I

The Coal Act provides as follows, in pertinent part:

(f) Reconsideration by Commissioner.—

> (1) In general.—Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner . . . detailed information as to the work history of the beneficiary and the basis of the assignment.
> (2) Review.—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner . . . shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

26 U.S.C. § 9706.

Though appellants argue that § 9706(f)(2) provides an independent right to review within thirty days of receiving additional information, the structure of the section precludes such a reading. Specifically, subsection (2) provides that an operator may request review within thirty days of receipt of the information "under paragraph (1)." A proper request under subsection (1), however, is made within thirty days of notice of the assignments. As appellants' request for information was untimely under subsection (1), they cannot

benefit from the additional thirty days provided for by subsection (2).[4]

Appellants next contend that the Commissioner violated her own internal operating procedures, specifically the Supplemental Coal Act Instruction No. 3, issued December 1994, which provided, in pertinent part:

> Use the following guidelines to process a request for review received after the timeframe for requesting the review has expired.
> Review the assignment (regardless of whether the assignee submitted evidence).
>
> 1. If your review decision concludes that the assignment(s) should be reversed:
> Then revise the assignments, and send the assignee the appropriate review response.
> 2. If your review decision affirms the assignment(s);
> Then notify the assignee that the request for review has been denied because it was not timely filed.

(App. 482.)

Appellants' argument fails for two reasons. First, we held in Lindsey Coal Mining Co. v. Chater that the Commissioner's internal Coal Act guidelines "lack the force of law," and "therefore, the agency is not bound to follow them and [coal operators are] not entitled to rely on them." 90

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[4] For similar reasons, appellants' contention that the Commissioner violated her own regulations, specifically 20 C.F.R. § 422.605, is also meritless.

F.3d 688, 693 (3d Cir. 1996). The cases cited by appellants are not to the contrary, as they hold only that an agency must provide an explanation when failing to follow its prior, established precedent. *See Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 229 (3d Cir. 2003); *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 153 (3d Cir. 1994).

Second, the procedure quoted above was not in effect when, in 1997, the Commissioner denied appellants' appeals. Rather, the procedures in force in 1997 state that "[i]f the request is not timely filed . . . [d]o not review the request." (App. 490.) Therefore, the Commissioner's decision was consistent with the internal procedures in effect at the time of the disputed decision.[5]

C

In making assignments, the Commissioner employs a rebuttable presumption in which she assumes that, absent evidence to the contrary, a miner who otherwise qualified for benefits under the Coal Act was "employed in the coal industry" for purposes of 26 U.S.C. § 9706(a) if (1) his employer was a coal mine operator that signed a national coal wage agreement and (2) his employment occurred during the employer's participation in the national coal wage agreement. Appellants claim that they employed some of their assigned

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[5] Appellants final argument on this point—that the Commissioner waived any timeliness defense she may have had by providing the earnings records—is belied by the record, which establishes that the Commissioner mistakenly mailed the earnings records to appellants. Indeed, the Commissioner explained that she had erred in providing the earnings records when she formally denied appellants' appeal. Appellants' contention is meritless.

beneficiaries in the steel industry, not the coal industry. They argue that the Commissioner's use of this rebuttable presumption is arbitrary and capricious. Their argument is both time-barred and meritless.

1

The District Court held that appellants' claims were barred as they had failed to seek administrative review within the required thirty-day period. Appellants concede this but argue that the thirty days should be tolled because of false and misleading statements made by the Commissioner. This argument is meritless.

We will equitably toll a statute of limitations where a plaintiff shows "active misleading by the defendant and . . . that he exercised reasonable diligence in attempting to uncover the relevant facts." *Forbes v. Eagleson*, 228 F.3d 471, 487 (3d Cir. 2000) (citation omitted).

Appellants point to various language in letters sent by SSA that they claim rises to the level of active misleading. Under a header reading "How We Assign Responsibility," SSA states, "We assign responsibility to an operator who our records show employed the miner in the coal industry under an UMWA agreement." (App. 773.) Also, in a "List of Assigned Miners and Other Beneficiaries," the SSA states, "Our records show that you employed the miner in the coal industry under an UMWA agreement and you are still in business." (App. 775.) Appellants contend that, in fact, the records SSA reviewed did not contain the information that SSA said they did, and that SSA concealed its use of the presumption by not mentioning it in its notices of assignment.

However, in the same notices, SSA explicitly states that it reviewed its "earnings records of retired coal miners identified by the UMWA benefit plans." (App. 772.) SSA does not purport to have reviewed records documenting the industry in which the miner worked. Furthermore, the agency's internal guidelines, which are available to the public, expressly state that "[e]arnings from a signatory operator posted to SSA's earnings records for a miner are *assumed* to be 'work in the coal industry.'" (App. 431 (emphasis added).) Finally, appellants—large and sophisticated businesses—had easy access to information describing the industries in which their employees worked. Had appellants exercised elementary due diligence, they could easily have dispelled any confusion. For these reasons, appellants' claims are time-barred.

2

In any event, the Commissioner's use of the rebuttable presumption is not arbitrary or capricious. "Presumptions may, of course, be established both by legislative bodies and by administrative agencies, but their validity depends as a general rule upon a rational nexus between the proven facts and the presumed facts." *United Scenic Artists, Local 829 v. NLRB*, 246 U.S. App. D.C. 48, 762 F.2d 1027, 1034 (D. C. Cir. 1985); *accord NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787, 99 S. Ct. 2598, 61 L. Ed. 2d 251 (1979) ("It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts."). We review the Commissioner's presumption both for consistency with the Coal Act and for rationality, *id.*, but we "may not simply substitute a different judgment that we might consider preferable," *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1361 (Fed. Cir. 1999). Appellants bear "the heavy burden of demonstrating that there is no rational connection between the fact proved

and the ultimate fact to be presumed." *Cole v. United States Dep't of Agric.*, 33 F.3d 1263, 1267 (11th Cir. 1994).

> Presumptions are permissible
>
> if there is a sound and rational connection between the proved and inferred facts and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it. . . . But if there is an alternate explanation for the evidence that is also reasonably likely, then the presumption is irrational.

Sec'y of Labor v. Keystone Coal Mining Corp., 331 U.S. App. D.C. 422, 151 F.3d 1096, 1100-01 (D. C. Cir. 1998) (quotation marks, alteration, and ellipsis omitted).

In support of their challenge to the presumption, appellants point to 26 U.S.C. § 9706, which provides, in pertinent part:

> (c) Identification of eligible beneficiaries.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall . . . provide to the Commissioner . . . a list of the names and social security account numbers of each eligible beneficiary . . . . In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) [i.e., signatory operators to whom the miners should be assigned] with respect to an eligible beneficiary . . . . In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection(a) [i.e., signatory

operators to whom the miners should be assigned] with respect to an eligible beneficiary . . . .

(d) Cooperation by other agencies and persons.—
(1) Cooperation.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner . . . in providing information which will enable the Commissioner to carry out his responsibilities under this section.

Appellants read this provision as a "Congressional mandate" and "statutory obligation" that the Commissioner "use the UMWA Benefit Plans' employment records" and not make the rebuttable presumption at issue here. (Appellant Br. at 46-47.) The statute, however, merely imposes an obligation on the *benefit plans* and the *heads of other federal agencies* to assist the Commissioner in matching beneficiaries with the appropriate signatory operators. The quoted provisions require nothing of the Commissioner and they certainly do not prohibit her from employing the rebuttable presumption at issue.

The Commissioner's rebuttable presumption is entirely reasonable. As appellants note, beneficiaries' personnel files can date back fifty to sixty years, and even a miner's own employer can have difficulty retrieving them. The Commissioner's rebuttable presumption is a sensible response to this problem. *See Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984) ("Presumptions of fact have been created to assist in certain circumstances where direct proof of a matter is for one reason or another rendered difficult."). As the District Court observed, "SSA's presumption that earnings from a signatory operator (of coal mines), posted to SSA's earnings records for the (coal) miner,

were for 'work in the coal industry' constitutes a 'reasonable inference' as contemplated by Congress." (App. 58.) Furthermore, though appellants may do business in other industries, they are (or are related to) signatory operators, i.e., businesses that signed collective bargaining agreements governing the wages to be paid UMWA workers by employers in the coal industry. *See* 26 U.S.C. § 9701(b)(1) & (c). They are therefore in a position to correct any misapprehensions. The presumption is rebuttable and therefore avoids problematic mechanical operation. For these reasons, the Commissioner's rebuttable presumption is not arbitrary or capricious.[6]

III

For the foregoing reasons, we will affirm the judgment of the District Court.

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[6] Appellants also contend that the Commissioner acted arbitrarily and capriciously in failing to provide the balance of records requested by Darryl Lilly, USSM's Manager of Human Resources. We agree with the District Court that the substance of Lilly's letters did not convey that he was seeking records regarding assignments made to both USSM and USX. As such, we need not address whether this claim is barred by the statute of limitations.

Finally, appellants contend that the Commissioner acted arbitrarily and capriciously in refusing to reconsider her denial of four specified requests for review filed by USSM. We affirm for the reasons discussed by the District Court.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1247

[Filed December 23, 2004]

USX CORPORATION and	)
U.S. STEEL MINING COMPANY, INC.,	)
Appellants	)
	)
v.	)
	)
JO ANNE B. BARNHART,	)
Commissioner of Social Security	)
	)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(Dist. Ct. No. 99-1058)
District Judges: Hon. Donald E. Ziegler,
Hon. Robert J. Cindrich

Before: SCIRICA, *Chief Judge*, and McKEE and CHERTOFF, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on November 18, 2004.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court, entered November 4, 2003, be and the same is hereby affirmed.

All of the above in accordance with the opinion of this Court.

Costs taxed against appellants.

Attest:

Chief Deputy Clerk

DATED: December 23, 2004

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 99-1058

[Filed November 20, 2002]

USX CORPORATION and	)
U.S. STEEL MINING COMPANY, LLC,	)
Plaintiffs,	)
	)
v.	)
	)
KENNETH S. APFEL, Commissioner	)
of Social Security,	)
Defendant.	)
	)

ORDER OF COURT

AND NOW, this 20th day of November, 2002,

IT IS ORDERED that the appeal from the order of the magistrate judge dated September 17, 2002, shall be and hereby is denied.

/s/ _____
Donald E. Ziegler
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1058

[Filed September 17, 2002]

USX CORPORATION and	)
U.S. STEEL MINING COMPANY, LLC,	)
Plaintiffs	)
	)
v.	)
	)
JOANNE B. BARNHART,	)
Commissioner of Social Security,	)
Defendant.	)
	)

Judge Donald E. Ziegler/
Magistrate Judge Sensenich
Re: Doc. # 89

ORDER

AND NOW this 17th day of September, 2002, it is hereby ORDERED that the Motion of Plaintiffs USX Corporation and U.S. Steel Mining Company, LLC for Leave to File a Third Amended Complaint is GRANTED as to Count I;

GRANTED IN PART as to Count II to list the names of miners previously identified in the 1993 assignment letters already placed in issue in the prior versions of the complaint; DENIED IN PART in Count II as to leave to amend the Complaint to include George Graham and the miners assigned in the June 30, 1995 letters from the Northeastern, the Great Lakes and the Western Program Services Centers in the successorship claim; and GRANTED IN PART and DENIED IN PART as to the Prayer for Relief, whereby Plaintiffs are granted leave to amend the Prayer for Relief but only to the extent necessary to comport with the amendments granted pursuant to this Order.

/s/_____
ILA JEANNE SENSENICH
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1058

[Filed September 17, 2002]

USX CORPORATION and	)
U.S. STEEL MINING COMPANY, LLC,	)
Plaintiffs	)
	)
v.	)
	)
JOANNE B. BARNHART,	)
Commissioner of Social Security,	)
Defendant.	)
	)

Judge Donald E. Ziegler/
Magistrate Judge Sensenich
Re: Doc. # 89

OPINION ON PLAINTIFFS' MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

Sensenich, Magistrate Judge.

A. INTRODUCTION

Plaintiffs, USX Corporation and U.S. Steel Mining Company, LLC (collectively "USX"), bring this action against Defendant, the Commissioner of Social Security (hereinafter "the Commissioner") to challenge various actions taken by the Commissioner in carrying out responsibilities under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701, *et seq.* (the "Coal Act"). Pursuant to this action, USX has moved for leave to file a Third Amended Complaint to address the issues raised by the impact of the U.S. Supreme Court's recent decision in *Barnhart v. Sigmon Coal Company, Inc.*, 122 S.Ct. 941 (2002) upon Counts I and II of the First Amended Complaint. For the reasons discussed below, Plaintiffs' Motion for Leave to File a Third Amended Complaint should be granted as to Count I, granted in part and denied in part as to Count II, and granted in part and denied in part as to the Prayer for Relief.

B. PROCEDURAL HISTORY

Plaintiffs filed their original complaint in this action on July 2, 1999. (Doc. # 1). On July 6, 1999, the case was referred for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. (Doc.# 2). Plaintiffs subsequently filed a First Amended Complaint on November 3, 1999. (Doc. # 8).

A report and recommendation was filed on August 30, 2000, recommending, *inter alia,* that a motion for partial summary judgment filed by Defendant be granted as to Counts I and II of the First Amended Complaint. (Doc. # 18). On September 29, 2000 U.S. District Judge Donald E. Ziegler signed a memorandum order granting Defendant's

motion for partial summary judgment and adopting the report and recommendation. (Doc. # 21). On August 6, 2001 USX filed a motion for reconsideration of the order adopting the report and recommendation, and requesting entry of summary judgment in their favor on Counts I and II of the First Amended Complaint. (Doc.# 50). Defendant filed his response in opposition to the motion for reconsideration and entry of summary judgment on Counts I and II on August 27, 2001. (Doc. # 53). In the meantime, USX also filed a Motion for Leave to File a Second Amended Complaint on April 16, 2001 (Doc. # 30) to add two additional claims against Defendant, which was granted as to Count XII and denied as to Count XIII by order dated December 3, 2001. (Doc. # 64).

On February 19, 2002 the Supreme Court handed down its decision in *Barnhart v. Sigmon Coal Company*, 122 S.Ct. 941 (2002), holding that the Coal Act does not allow the Commissioner of Social Security to assign beneficiaries to a successor in interest of an out-of-business signatory coal operator. As Counts I and II of the First Amended Complaint contain assignments made to Plaintiffs on that basis, the parties by order dated February 28, 2002 were granted the opportunity to address the impact of *Sigmon* on this court's decision regarding Plaintiffs' motion for reconsideration of and entry of summary judgment on Counts I and II of the First Amended Complaint. (Doc. # 71).

After such briefing, a report and recommendation was filed on May 16, 2002 recommending that the motion for reconsideration be granted and, in light of *Sigmon*, that the order of September 29, 2000 be vacated as to Counts I and II and that Defendant's motion for summary judgment as to Counts I and II be denied. (Doc. # 85). The parties waived the right to file objections. After review of the recommendation, on May 24, 2002 U.S. District Judge

Donald E. Ziegler signed a memorandum order granting the motion for reconsideration, vacating the order of September 29, 2000 as to Counts I and II, denying Defendant's motion for summary judgment as to Counts I and II, and adopting the report and recommendation. (Doc. # 88). A status conference was held on May 16, 2002 at which time USX was granted until June 7, 2002 to file a motion to amend the complaint. Plaintiffs filed their motion for leave to file a ThirdAmended Complaint on June 7, 2002 (Doc.# 89) to which Defendant filed an opposition on June 28, 2002. (Doc. # 92).

C. DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure provides for amendment of a pleading once as a matter of course at any time before a responsive pleading is served and then "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The Supreme Court has interpreted Rule 15(a) to require the court to give leave to amend as follows:

> In the absence of any apparent or declared reason–such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). In the instant case, Plaintiffs have moved for leave to file a Third Amended Complaint as a protective measure to "expressly place on the record the names of all of the miners presently known to have

been assigned to Plaintiffs under the successorship theory, and to require the Commissioner to revoke any other 'successorship' assignments that may be discovered later." (Plts.' Mem. in Supp. of Mot. at 2 (Doc. # 90)).

As an initial matter, Rule 15(a) states that it provides for amendment of a pleading "only by leave of court **or by written consent of the adverse party**. . . ." Fed.R.Civ.P. 15(a)(emphasis added). In Defendant's Opposition to Plaintiffs' Motion for Leave to File a Third Amended Complaint, Defendant stipulates that she has no objections to certain of Plaintiffs' proposed amendments:

> Defendant has no objections to plaintiffs' proposed revisions to Count I because, unlike their proposed amendments to Count II, plaintiffs do not seek to expand Count I to include additional assignment letters. Instead, plaintiffs merely identify the specific miners at issue in the challenged assignment letter. Similarly, defendant does not object to plaintiffs' proposed revisions to Count II to the extent they simply clarify the miners identified in the previously mentioned 1993 assignment letters, which were assigned to USM based on their employment by Crystal Block. Nor does defendant object to plaintiffs' proposed deletion of the reference to "acceptance miners," which were assigned to USM on September 27, 1993, because plaintiffs' claims with respect to those miners were covered by Count VIII, which the parties agreed to voluntarily dismiss.

(Def.'s Opp. at p. 3 n.1 (Doc.# 92)). As Defendant has consented in writing to allow Plaintiffs' proposed amendment to Count I as provided in its Third Amended Complaint (attached as Exh. A to Doc.# 89) and to allow USX's

amendment to Count II but only to the extent that it lists the names of miners previously identified in the 1993 assignment letters already placed in issue in the prior versions of the complaint, Plaintiffs' Motion for Leave to File a Third Amended Complaint should be granted as to Count I and granted as to Count II to the extent that it lists the names of miners previously identified in the 1993 assignment letters.

Still at issue, however, are Plaintiffs' other proposed amendments, including those which: 1) seek to expand their claims to include miners assigned by letters dated June 30, 1995 from the Northeastern, the Great Lakes and the Western Program Service Centers who were not included in their prior complaints (3d Amended Compl. at Count II, ¶ 41, attached as Exh. A to Doc. # 89); 2) contest the assignment of George Graham in 1993 to USX on the basis that USM was a successor of Crystal Block (*id.*); and 3) change the Prayer for Relief beyond the scope of the changes dictated by amending Counts I and II. *(Id.* at p. 39).

The Coal Act provides that an assigned operator may, upon receiving notice of an assignment, "within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment." 26 U.S.C. § 9706(f)(1). Upon receipt of these records, an operator may then "within 30 days of receipt of the information . . . request review of the assignment." 26 U.S.C. § 9706(f) (2).

USX admits that, with regard to the miners assigned to it by the letters dated June 30, 1995 from the Northeastern, the Great Lakes and the Western Program Service centers, it did not timely challenge these assignments as provided forby the statute. (3d Amended Compl. at Count II, ¶ 42, attached as Exh. A to Doc.# 89). USX also admits that it did not timely

challenge the assignment of George Graham in 1993. *(Id.)*. Assuming, *arguendo,* that USX was not required to exhaust[1] its administrative remedies before seeking judicial review of these assignments, USX still failed to challenge the assignment to it of any of these miners when it filed its original Complaint on July 2, 1999. USX also failed to raise such a challenge when it filed its First Amended Complaint on November 3, 1999, and when it filed its Second Amended Complaint on January 30, 2001. (*See* Doc. #s 1, 8, and 30).

A six-year statute of limitations applies to civil actions brought against the United States for review of decisions by administrative agencies. 28 U.S.C. § 2401(a); *see, e.g., Sierra Club v. Slater*, 120 F.3d 626, 631 (6th Cir. 1997); *Pennsylvania Dep't of Public Welfare v. U.S. Dep't of Health and Human Services*, 101 F.3d 939, 944-45 (3d Cir. 1996). The letters assigning the miners to USX were issued on September 28, 1993 in the case of George Graham (A.R. Tab 28, at 33119, attached as Exh. 9 to Doc. # 94) and on June 30, 1995 for the other miners at issue. (A.R. Tab 28, at 33192-33224, attached as Exhs. 1, 2 and 3 to Doc. # 94). The applicable six-year statute of limitations thus expired on USX's claim for review of the assignment of George Graham on September 28, 1999 and on June 30, 2001 for the other miners in question. Plaintiffs first requested review of the assignment of these miners in their Motion for Leave to File

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[1] *See, e.g., Dixie Fuel Co. v. Apfel*, 171 F.3d 1052, 1059 (6th Cir. 1999)(where action involving Coal Act was brought pursuant to APA, because Coal Act provides that its assignments are operative pending administrative review, 26 U.S.C. § 9706(f)(5), Coal Act and its regulations do not mandate exhaustion of remedies and district court had no discretion to require coal company to exhaust administrative remedies before seeking judicial review).

a Third Amended Complaint filed on June 7, 2002, well after the statute of limitations had run.

Plaintiffs argue that the statute of limitations should not bar these claims. Plaintiffs state that because they were "not aware that the disputed miners had been assigned to them under a successorship theory until after SSA filed the Administrative Record[2] in this case," they should be allowed to amend the complaint to add these miners. (Doc. # 93 at p. 2). Plaintiffs further argue that under the Federal Rules' liberal standards for notice pleading, they did not need to identify "every – or any – wrongfully assigned miner in the Complaint.(Doc.# 90 at p. 4). It should be enough that in Counts I and II, they clearly challenged the assignment of miners under a successorship theory and that under notice pleading, they have put Defendant on notice as to the nature of the claim and that their prior pleading therefore encompasses these disputed miners. *(Id.)*.

Plaintiffs also argue that Rule 15(c) provides that an amendment of a pleading "relates back" to the date of the original pleading if "(2) the claim or defense asserted in the amended pleading arose out of the conduct, common transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ." Fed.R.Civ.P. 15(c)(2). They allege that because they timely contested certain specific assignments on a successorship theory in their original Complaint in July of 1999, they should now be allowed to freely amend the complaint to challenge all such miners who may have been assigned to USX on a successorship theory at any time and that under the "relation back" doctrine, such

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[2] The Administrative Record was filed on May 18, 2001. (*See* Doc. #s 34-42).

claims are timely as they arise "out of the conduct, common transaction, or occurrence" set forth in the original Complaint.

USX's arguments do not suffice to overcome the bar of the statute of limitations. Plaintiffs explain their delay in raising a challenge to these miners by claiming they did not have notice of these assignments when they filed their original Complaint. In support, they have filed the affidavit of James T. Carney, Vice President of Administration for United States Steel and Carnegie Pension Fund from December 1, 1989 to October 31, 2000. Mr. Carney avers that when he assumed responsibility for the Coal Act assignments in December of 1995, he did not have personal knowledge of these assignments until he reviewed the Administrative Record sometime after May 15, 2001 because the letters were not in the files he received when he took charge. (Carney Aff. at ¶¶ 2-8, attached as Exh. A to Doc. # 93).

The Administrative Record to which Mr. Carney refers contains copies of the assignment letters sent to USX on September 28, 1993 and on June 30, 1995. (*See* A.R. Tab 28, at pp. 33119 and 33192-33224, attached as Exhs. 9, 1, 2 and 3 to Doc. # 94). Mr. Carney's personal knowledge of these letters and assignments therein is irrelevant, however, as the letters themselves establish that USX as a corporate entity had notice of the assignment of George Graham in September of 1993 and of the other miners at issue on June 30, 1995, when the letters were sent. This notice is confirmed by the fact that USX subsequently sent letters to the Commissioner on August 21, 1995, untimely requesting administrative review of the June 30, 1995 assignments. (A.R. Tab 32, at 33537-33538, attached as Exhs. 4 and 5 to Doc. # 94). USX also *sent* an untimely request for review of the George Graham assignment on August 22, 1997. (A.R. Tab 42, at 34766, attached as

Exh. 10 to Doc. # 94). As these letters clearly reference the miners at issue here, USX cannot argue that it had no notice of these assignments before it filed its original Complaint on July 2, 1999 or before it received the Administrative Record in May of 2001.

Defendants have established that USX as a corporate entity had notice of the assignments well before the expiration of the statute of limitations. As the statute of limitations on their claims began to run upon receipt of the letters and has long since expired, USX should not now be granted leave to amend to include George Graham or the June 30, 1995 miners at issue in Count II of its Third Amended Complaint, as Plaintiffs could have included both claims along with their other successorship challenges in their original Complaint filed on July 2, 1999. USX also had the chance to include the claim for the June 30, 1995 miners in their subsequent First Amended Complaint filed on November 3, 1999 or in the Second Amended Complaint filed April 16, 2001, but failed to do so.

Defendants further argue that USX should not be allowed to include George Graham and the June 30, 1995 miners in their proposed amendment to Count II on grounds of futility because even if USX is granted leave to amend the complaint as to these miners, the statute of limitations has run and such amendment would be futile. Where a proposed amendment alleges a claim which is barred by a statute of limitations, it is not an abuse of discretion to deny the motion to amend on grounds of futility. *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988).

A denial of leave to amend may also be based on undue delay and/or repeated failure to cure deficiencies by amendments previously allowed. *Foman v. Davis*, 371 U.S.

178, 182 (1962). In the absence of substantial or undue prejudice, "denial must instead be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz v. CSX Corporation*, 1 F.3d 1406, 1414 (3d Cir. 1993), *citing Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981, *cert. denied,* 455 U.S. 1018 (1982). Where a proposed amendment was requested three years after the action was filed and nearly two years after the complaint was amended for the second time, the district court did not abuse its discretion in denying a Rule 15(a) motion to amend the complaint. *Lorenz*, 1 F.3d at 1414. If there is an unreasonable delay in requesting leave to amend and where the proposed amendment is futile, the court may deny leave to amend. *Id.*

Delay "may become undue when a movant has had previous opportunities to amend a complaint." *Cureton v. National Collegiate Athletic Association*, 252 F.3d 267, 273-74 (3d Cir. 2001) (finding no error in the district court's denial of leave to amend where "delay was undue" as motion was filed three years after complaint was filed, the facts upon which proposed amendment relied were known almost two and a half years prior to moving to amend and where no "reasonable explanation" existed to overlook the delay); *see also Lorenz*, 1 F.3d at 1414 (three year lapse between filing of complaint and proposed amendment is unreasonable delay where plaintiff had numerous opportunities to amend); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654-55 (3d Cir. 1998) (rejecting proposed second amended complaint where plaintiffs were repleading facts which could have been pleaded earlier).

In the instant case, USX had notice of the claim regarding George Graham in September of 1993 and of the claims regarding the other miners as of June 30, 1995. Mr. Carney's affidavit does not offer a "reasonable explanation" of the delay in filing for leave to amend to add these miners. The fact that he as an individual personally did not have notice of the claims[3] before May 18, 2001 when the Administrative Record was available is immaterial given that USX as a corporate entity did have notice before filing the original Complaint in July of 1999, the subsequent First Amended Complaint in November of 1999, and the Second Amended Complaint in April of 2001.

USX has waited over three years from filing the original Complaint to file a motion for leave to amend to contest these assignments. This constitutes undue delay. Further, the statute of limitations has run on judicial review of these claims. Therefore amendment of Plaintiffs' Complaint as to Count II to add these claims would be futile.

In sum, Plaintiffs' Motion for Leave to File a Third Amended Complaint should be granted as to Count I and granted as to Count II but only to the extent that the amendment consists of listing the names of miners previously identified in the 1993 assignment letters. Plaintiffs, however, should be denied leave to amend their Complaint in Count II to contest the assignment of George Graham and of the miners assigned in the June 30, 1995 letters from the Northeastern, the Great Lakes and the Western Program

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[3] Carney's assertion that he was unaware that George Graham was assigned to USX on a successor theory is belied by his letter of August 27, 1997 contesting the assignment on grounds that USX was not a "related party" to North Fork Coal. (A.R. Tab 42, at 34766, attached as Exh. 10 to Doc. # 94).

Services Centers, and Plaintiffs should be granted leave to amend their Prayer for Relief but only to the extent necessary to comport with the amendments herein permitted.

D. CONCLUSION

For the reasons discussed above, Plaintiffs' Motion for Leave to File a Third Amended Complaint will be granted as to Count I, granted in part and denied in part as to Count II, and granted in part and denied in part as to the Prayer for Relief.

/s/_____
ILA JEANNE SENSENICH
United States Magistrate Judge

Dated: September 17, 2002

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

(2)

No. 05-21

In the Supreme Court of the United States

USX CORPORATION, ET AL., PETITIONERS

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
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QUESTION PRESENTED

Whether the district court properly exercised its discretion under Rule 15(a) of the Federal Rules of Civil Procedure in denying petitioners leave to amend a complaint because petitioners substantially delayed raising the new allegations, failed to avail themselves of earlier opportunities to cure deficiencies in the complaint, and attempted to raise new claims at a late stage of the trial proceedings.

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In the Supreme Court of the United States

No. 05-21

USX CORPORATION, ET AL., PETITIONERS

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-23a) is reported at 395 F.3d 161. The opinions of the district court (Pet. App. 26a) and of the magistrate judge (Pet. App 27a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2004. A petition for rehearing was denied on March 31, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701-9722, to ensure adequate funding for health benefits promised to retired miners and their dependents. *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-515 (1998). The Coal Act requires the Commissioner of Social Security to assign responsibility for funding individual beneficiaries' premiums to certain coal operators that had signed a collective-bargaining agreement between the United Mine Workers of America and the Bituminous Coal Operators Association. 26 U.S.C. 9701(c)(1), 9706(a). If such an operator dissolves, the Coal Act authorizes the Commissioner to impose premiums on organizations that are "related" to the original operator through common ownership, common control, or other factors. 26 U.S.C. 9701(c)(2); *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438 (2002).

2. Petitioners filed an action on July 2, 1999, challenging several premium assignments made to them by the Commissioner under the Coal Act in 1993 and 1995. Pet. App. 4a-5a. The case was referred to a United States Magistrate Judge for pretrial proceedings and a recommended disposition. 28 U.S.C. 636(b)(1)(A) and (B).

Petitioners amended their complaint twice to add new counts, first on November 3, 1999, and again on April 16, 2001. Pet. App. 30a-31a. The Second Amended Complaint set forth thirteen separate counts, several of which challenged assignments to petitioners as the direct successors-in-interest of the employing signatory coal operators under 26 U.S.C. 9701(c)(2)(A). Pet. 1a-5a. The district court originally rejected those claims and

granted partial summary judgment to the Commissioner. In light of this Court's subsequent holding in *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438 (2002), however, the district court, on May 24, 2002, reversed its holding and granted summary judgment for petitioners with respect to these claims. Pet. App. 5a, 14a, 31a-32a.

Petitioners thereafter, on June 7, 2002, sought leave to file a Third Amended Complaint challenging the assignment of 34 previously unidentified beneficiaries that petitioner alleges would also have been invalidated under *Sigmon*. Pet. App. 32a. The magistrate denied leave to amend, concluding that petitioners' had engaged in "undue" delay in seeking to amend their complaint for the third time. *Id.* at 40a. The magistrate explained that petitioners had adequate notice of the challenged assignments before commencement of the action and the filing of two prior amended complaints; that petitioners had waited more than three years since commencement of the action to raise the new claims; and that petitioners had failed to offer a reasonable explanation for their failure to include the 34 beneficiaries in question earlier. *Id.* at 37a-40a. The district court adopted the magistrate's ruling without further discussion. *Id.* at 26a.

3. The court of appeals affirmed, concluding that the district court did not abuse its discretion in denying leave to amend based on petitioners' undue delay. Pet. App. 12a-15a. The court of appeals explained that petitioners had notice of the challenged assignments before filing their original complaint. *Id.* at 13a. The court of appeals also observed that "at the time of their first amendment—and for almost a year thereafter— [petitioners] had no reason to believe that listing the additional assignments would be futile." *Id.* at 14a. Because petitioners had "waited over three years to amend to

contest these assignments and had notice of the assignments prior to filing both the original and the first amended complaint," the court of appeals held that the district court did not abuse its discretion in denying leave to amend the complaint for a third time. *Id.* at 15a.

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners leave to file a third amended complaint. That fact-bound holding applies well-established standards governing the amendment of pleadings and does not warrant further review by this Court.

1. The standards governing the amendment of pleadings are well settled and are set forth in Federal Rule of Civil Procedure 15(a), which provides that after a responsive pleading, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Thus, while leave should be granted "when justice so requires," it is well settled that leave may be denied on account of "*undue delay*, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of the amendment." *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (emphasis added).

The court of appeals correctly found that the district court's denial of leave to amend was properly based on petitioners' "undue delay." *Foman*, 371 U.S. at 182. Although petitioners argue (Pet. 4, 13) in this Court that the lengthy delay in seeking to amend the complaint was due to their counsel's lack of knowledge of the Commis-

sioner's assignments of the 34 beneficiaries, the court of appeals held, and petitioners do not dispute, that petitioners themselves "had notice of the assignments prior to filing both the original complaint and the first amended complaint" but nonetheless waited three years before seeking to contest these assignments. Pet. App. 15a. Thus, given petitioners' failure to offer any reasonable explanation for the lengthy delay, the district court did not abuse its discretion in determining that petitioners' delay was undue and that petitioners were not entitled to leave to amend their complaint for a third time.

2. Petitioners argue that the courts of appeals are divided on the issue of whether undue delay is a sufficient basis for denying leave to amend a complaint. Pet. 8-11. That is not correct. Indeed, this Court has already held in *Foman*, *supra*, that undue delay is grounds for denial of leave to amend. Not surprisingly, the courts of appeals, following this Court's decision in *Foman*, have uniformly held that substantial delay in conjunction with such other factors as prejudice to the non-moving party, failure to raise the allegations in earlier amendments, the interjection of new claims or issues at a late stage of the trial proceedings, or inability to account for a lengthy delay may rise to *undue* delay warranting denial of leave to amend. See, *e.g.*, *Harrison* v. *Rubin*, 174 F.3d 249, 252-253 (D.C. Cir. 1999) (leave to amend may be denied for undue delay where movant seeks to add new factual allegations); *Acosta-Mestre* v. *Hilton Int'l of P.R.*, 156 F.3d 49, 52 (1st Cir. 1998) (party seeking leave to amend must explain reasons for lengthy delay); *State Teachers Ret. Bd.* v. *Fluor Corp.*, 654 F.2d 843, 855-856 (2d Cir. 1981) (undue delay may warrant denial of leave to amend); *Chaudhry* v. *Gallerizzo*, 174 F.3d 394, 404 (4th Cir.) (leave to amend

denied for undue delay where movant failed to cure deficiencies in the complaint in prior amendments), cert. denied, 528 U.S. 891 (1999); *Smith* v. *EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (same); *Duggins* v. *Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (leave denied where non-moving party may be prejudiced by claims raised at late stage of trial proceedings); *Dubicz* v. *Commonwealth Edison Co.*, 377 F.3d 787, 793 nn.1-2 (7th Cir. 2004) (same); *Roberson* v. *Hayti Police Dep't*, 241 F.3d 992, 995-996 (8th Cir. 2001) (undue delay may warrant denial of leave to amend); *Bonin* v. *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (leave may be denied for "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings"), cert. denied, 516 U.S. 1051 (1996); *Frank* v. *U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (leave may be denied for undue delay or failure to cure deficiencies by amendments previously allowed); *Smith* v. *Duff & Phelps, Inc.*, 5 F.3d 488, 493-494 (11th Cir. 1993) (leave may be denied where claims were raised at late stage of proceedings and movant had earlier opportunities to cure deficiencies in complaint).

The court of appeals decision here is fully consistent with those decisions. Although many of the decisions cited by petitioner observe that delay alone is not

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As petitioner observes (Pet. 10), the Ninth Circuit stated in *Bowles* v. *Reade*, 198 F.3d 752, 757 (1999), that "[u]ndue delay * * * is insufficient to justify denying a motion to amend." But as noted in the text, *Foman* expressly holds to the contrary and the Ninth Circuit in *Bonin* recognized that undue delay is grounds for denial of leave to amend. In any event, any intracircuit conflict would be for the Ninth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

grounds for denial of leave to amend, Pet. 9-11, the court of appeals in this case acknowledged that "delay alone is an insufficient ground to deny leave to amend." Pet. App. 12a (quoting *Cureton* v. *NCAA*, 252 F.3d 267, 273 (3d Cir. 2001)). The court of appeals further explained, however, that "[a]t some point, * * * delay will become 'undue,' placing an unwarranted burden on the court, or will become 'prejudicial,' placing an unfair burden on the opposing party." *Ibid.* It noted that delay may become undue when the movant has failed to avail itself of earlier opportunities to amend the complaint, and that the interests in judicial economy and finality become particularly compelling, and militate against granting leave to amend, when parties, such as petitioners, delay making a motion to amend until after summary judgment has been granted. *Id.* at 12a-13a. The court of appeals' holding that the district court did not abuse its discretion in denying leave to amend in those circumstances consequently does not present any conflict in appellate decisions warranting further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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